UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

In re:	:	
RAYMOND T. HYER, JR., GARDNER INDUSTRIES, INC., et al.	:	Case Nos. 92-20777, 92-20779 - 92-20791
Debtors,	:	
UNITED STATES OF AMERICA	:	
Plaintiff,	:	Adv. No. 02-2067-BKC-RBR-A
vs.	:	
RAYMOND T. HYER, JR., GARDNER ASPHALT CORPORATION, and EMULSION PRODUCTS COMPANY,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF UNITED STATES OF AMERICA'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

A. The Relief Which Plaintiff Seeks

On March 8, 2002, Plaintiff, the United States of America, filed its adversary complaint on behalf of the Environmental Protection Agency ("EPA") in the above action. Plaintiff seeks declaratory rulings that:

(1) claims it has against Debtor-Defendants Raymond T. Hyer, Jr. ("Hyer") and Gardner Asphalt Corporation ("Gardner"), and Defendant Emulsion Products Company ("Emulsion"), under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act

("CERCLA"), as amended, 42 U.S.C. § 9703(a)(3), for response costs incurred as a result of a "removal" action conducted by the Environmental Protection Agency ("EPA") in 1996-97, did not arise until after confirmation of the Debtors' plan of reorganization ("Plan") in 1993;

(2) if the claims arose prior to Plan confirmation, the United States' claim against Debtor-Defendant Hyer is excepted from discharge, under the exception for willful and malicious injury set forth in 11 U.S.C. § 523(a)(6), because Hyer ordered drums of waste materials to be buried on the property of another person or entity after he was told by a subordinate that such burial violated EPA regulations;

(3) the Section 107(a)(3) CERCLA claim the United States has against Defendant Emulsion, whose stock at all relevant times has been owned by Hyer but which was not a Debtor in the above cases, was not discharged as a result of confirmation of Debtors' Plan, regardless of when it arose;

(4) the United States is not barred from bringing its claim against Emulsion under the doctrines of res judicata, collateral estoppel, or claim preclusion.

B. Issues to be Resolved in This Proceeding

On April 22, 2002, the Court entered an Order granting the Parties' Joint Motion For Continuance of Pretrial Conference and Related Pretrial Deadlines, Bifurcation, and For Determination of Issues to be Heard. Under the Order, the issues to be resolved in this proceeding are:

(1) When did the United States' claim – under Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), on behalf of EPA ("EPA Claim") – arise against Emulsion? (The claim against Emulsion is based upon its activities in 1981.)

(2) In the event the EPA Claim against Emulsion, a non-debtor, arose prior to the filing of Debtors' bankruptcy petition, did Emulsion receive under the Plan: (1) a discharge; or (2) other relief precluding the United States from bringing the EPA Claim against it?

(3) When did the EPA Claim against Debtor Gardner Asphalt Corporation (New Jersey) ("GACNJ") arise? (The claim against GACNJ is based upon its activities in 1981.)

(4) When did the EPA Claim against Hyer arise? (The claim against Hyer is based upon his activities in 1981.)

(5) If the EPA Claim against Hyer arose prior to the filing of Debtors' bankruptcy petition, can the EPA Claim be excepted from discharge under 11 U.S.C. § 523(a)(6), notwithstanding the provisions of Rule 4004(a), Fed. R. Bankr. P.?

(6) If the issue in subparagraph 5 is resolved in favor of the United States, should the EPA Claim against Hyer be excepted from discharge under 11 U.S.C. § 523(a)(6)?

(7) If the EPA Claim against GACNJ arose after confirmation of the Plan, who is/are the successor(s) to GACNJ according to the Plan?

Except for item 7, there are no genuine issues of material fact regarding these issues, all of which should be resolved in favor of the United States. Thus, pursuant to Rule 56(a), (c), and (d), Fed. R. Civ. P., the Court should enter summary judgment in favor of the United States as to the first six issues.

C. Summary of Plaintiff's Case

1. Summary of Pertinent Facts

The Emergency Response Section ("ERS") of EPA Region III performed a "removal" action at the Krewatch Farm Site ("Site") near Seaford, Delaware, beginning in April, 1985. The primary hazard at the Site was that oil had contaminated soil and was threatening to pollute a stream adjacent to the Site; thus, EPA used its authority under Section 311(c) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(c), to clean the Site of oil and grease. The physical labor involved in cleaning the Site lasted for about six weeks, ending July 29, 1985, after which EPA left the Site.

During its site investigation, EPA discovered a remote area where it suspected drums might be buried. Toward the end of July, 1985, EPA found out that Tony Nero had arranged for drums from an "asphalt company" in Seaford to be buried in that area ("Drum Burial Area"), but did not succeed in contacting Nero. In any event, it did not appear that the drums, the contents of which were believed to be tar, posed any pollution hazard to the stream. Thus, EPA could not use CWA funds to investigate the Drum Burial Area. Nevertheless, since it was at least possible that the drums' contents might have threatened ground water at the Site, EPA used some small, presently unknown amount of CERCLA funds in July, 1985 to investigate the Drum Burial Area. Based upon the investigation, EPA's On Scene Coordinator ("OSC") for the Site concluded that any threat to the environment posed by the drums was insufficient to justify an emergency response; thus, he asked Region III's Site Investigation and Support Section ("SISS") to do a follow up inspection.

The Coast Guard, which administered the CWA funds used to clean the Site, billed the estate of Ed Krewatch, the deceased site owner, for CWA cleanup costs amounting to $94,567.57. The United States' representatives in this case have been unable to determine, thus far, whether the Krewatch estate paid the CWA costs, and how much in CERCLA funds was spent during the 1985 removal or whether anyone was billed for the CERCLA costs.

In 1987, contractors for EPA's ERS and SISS performed non-sampling inspections of the Site and recommended further investigation of the Drum Burial Area. At EPA's request, Delaware's Department of Natural Resources and Environmental Control ("DNREC") conducted a follow-up inspection of the Drum Burial Area and reported its results, including sampling data, to EPA. An EPA toxicologist reviewed DNREC's report and sampling data and concluded that the Drum Burial Area

was a "relatively benign" site and that she did not anticipate any threat to human health or the environment there.

There was no EPA or DNREC activity at the Site again until 1994, when DNREC returned to the Drum Burial Area, took samples, and found a high level of polyaromatic hydrocarbons in a drum sample. DNREC notified Emulsion, a business in Seaford that had an asphalt plant, that it was potentially responsible to clean the Site. Gardner, an affiliate of Emulsion, then responded to DNREC on Emulsion's behalf and eventually agreed to remove the drums. After a misadventure that resulted in some drums spilling their contents in the process of removal, and a determination that the drum removal project would be more expensive than it had bargained for, Gardner terminated its removal activities. In 1996, after DNREC's negotiations with Gardner to resume the cleanup failed, DNREC asked EPA to finish the cleanup. Since November, 1996, EPA has incurred response costs slightly in excess of $1 million at and in connection with the Drum Burial Area. Ed Krewatch's estate and Nero have agreed to pay a portion of EPA's response costs. Depending upon how much the Krewatch estate receives from selling the Site, the United States' recovery may reach approximately 38% of its accrued costs to date.

DNREC discovered in 1994 or 1995 that some of the drums in the Drum Burial Area had originated at the Kearney, New Jersey plant owned or operated by Gardner Asphalt Company (New Jersey) ("GACNJ"). In July, 1981, GACNJ sent approximately 200 drums of waste to Emulsion's plant in Seaford. Contemporaneously, Kearney's plant manager advised Emulsion's president, Newlin Buckson, that Hyer ordered the drums to be buried in Seaford. Buckson then questioned Hyer directly and noted that burying drums of waste in unauthorized burial sites was against EPA's regulations; in

response, Hyer directed Buckson to "bury them." At least some of the drums which Emulsion received from GACNJ were shipped, along with drums of its own, to the Krewatch Farm Site for disposal in August, 1981. Tony Nero had the drums buried in the Drum Burial Area.

Hyer, GACNJ and a number of affiliates (though not Emulsion) petitioned for bankruptcy relief in 1992. Their plan of reorganization ("Plan") was confirmed in 1993.

2. Summary of Argument

According to prevailing law, a CERCLA claim arises: (1) when a potential CERCLA claimant can tie the debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs; or (2) when the potential claimant can fairly contemplate at the time of the debtor's bankruptcy that it will incur future response costs based on debtor's pre-petition conduct. Under both tests, the United States' claims for the response costs EPA began to incur, in November 1996 in connection with the Drum Burial Area, arose well after the Plan was confirmed.

During Debtor-Defendants' bankruptcy, EPA could not tie either Hyer or GACNJ to a release or threat of release of a hazardous substance that it knew, or fairly could have contemplated, would lead to the incurrence of response costs. EPA did not know it would incur response costs at the Drum Burial Area, nor could it have fairly contemplated incurring such costs, until DNREC asked EPA in 1996 to take over cleanup of the Drum Burial Area. Indeed, an EPA toxicologist had concluded in December 1988, slightly more than three years prior to Debtor-Defendants' bankruptcy, based upon a DNREC report and sampling data, that the Drum Burial Area was a "relatively benign" site that she did not anticipate would pose a threat to human health or the environment. It would have been counterintuitive – not to mention violative of Congress's intent that EPA focus its efforts on sites which

the Agency knows pose threats to public health – for EPA to have, nevertheless, undertaken an investigation as to who might be liable to clean up the Drum Burial Area. Based upon the data EPA had in 1988, EPA could reasonably have concluded that it would never have had to clean the Drum Burial Area.[1/] Moreover, had EPA nonetheless investigated who might be liable, the "asphalt company" in Seaford was Emulsion, as DNREC concluded in 1994 when it issued its first cleanup order regarding the Drum Burial Area. Emulsion was never a bankruptcy debtor.

Were this Court to conclude, however, that the United States' claim for response costs at the Drum Burial Area arose in 1985, when EPA first became aware of the existence of the Area, all three of the Defendants may nevertheless be liable under CERCLA. Debtor Hyer is liable, under 11 U.S.C. § 523(a)(6), because he willfully injured the property of another by ordering drummed waste to be

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[1/] Debtor may argue, based upon representations made during oral argument on December 5, 2001, regarding Plaintiff's Motion to Reopen debtors' bankruptcy cases, that EPA's claim arose in 1985 because EPA incurred some small amount of CERCLA response costs then. Assuming, as seems likely, that the Agency was never reimbursed for those costs, nevertheless EPA had no claim against the Debtor for such costs in 1992, when Debtor went into bankruptcy, because the three year statute of limitations codified at Section 113(g)(2)(A) of CERCLA, 42 U.S.C. § 9613(g)(2)(A) had run in 1988. That provision requires the commencement of an action for recovery of costs under Section 107 of CERCLA within three years after completion of the removal action. Even if it could be construed that the United States had a claim for the time EPA's toxicologist spent evaluating DNREC's 1988 report, and sampling results from the Drum Burial Area, and writing her report in December, 1988, the statute of limitations for any such claim passed in December, 1991, prior to Debtors' bankruptcy. The United States' claim in this case is based solely upon costs incurred since November, 1996.

It does not appear that the United States ever had any claim against the Debtor-Defendants under the CWA. Had there been such a claim, it would have been barred either by the three year federal statute of limitations regarding tort actions or the six year limitations period for quasi-contract actions. *See generally United States v. C&R Trucking Co.*, 537 F. Supp. 1080, 1082-83 (N.D. W.Va 1982), and cases cited therein (three year statute of limitations applies); *contra United States v. P/B/ STCO 213,* 569 f. Supp. 743, 744 (S.D. Tex. 1983). Presently a three year statute of limitations governs cost recovery for oil spills. *See* Section 1017(f) of the Oil Pollution Act, 33 U.S.C. § 2717(f).

buried in Seaford in 1981. Emulsion is liable regardless of when the United States' claim for its response costs arose, since Emulsion was not a debtor and did not receive a discharge or any other relief under the Plan from the United States' claim. Gardner is liable as an "operator," under Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), for its own activities in 1996 as a result of its releases of hazardous substances during the aborted 1996 cleanup.[2/]

II. STANDARD FOR GRANTING SUMMARY JUDGMENT

In 1986, a trilogy of Supreme Court cases established that summary judgment procedure is integral to securing the just, speedy, and inexpensive disposition of litigation. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as integral part of the Federal Rules as whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.* 477 U.S. at 247; *Celotex Corp. v. Catrett*, 477 U.S. at 323; *McCaleb v. A.O. Smith Corp.*, 200 F.3d 747, 750 (11th Cir. 2000). The moving party bears the initial burden of demonstrating the absence of a genuine dispute as to any material fact. *Catrett*, 477 U.S. at 323;

[2/] The United States filed a Complaint in the United States District Court for the District of Delaware against Hyer, Gardner, and Emulsion on September 28, 2001, in *United States v. The Ed Krewatch Partnership, et al., C.A. No. 01-660-GMS (D. Del.)*. The claim relating to Gardner's 1996 activities will be litigated in that proceeding.

Bingham, Ltd. v. United States, 724 F.2d 921, 924 (11th Cir. 1984). The burden is discharged by showing that there is "an absence of evidence to support the nonmoving party's case." *Catrett*, 477 U.S. at 325. Upon that showing, the burden shifts to the non-moving party. The non-moving party may not rest upon mere allegations in the pleadings, but must come forward with specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Id.*, at 322-24; *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

If the non-moving party fails to make a sufficient showing on any essential element of his claim, all other facts are rendered immaterial, and summary judgment is appropriate. *Catrett*, 477 U.S. at 322-23. "The mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. The relevant rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor." *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000).

Viewing the evidence in the light most favorable to the Defendants, there are no genuine issues of material fact relating to the first six issues set forth in Section I.B, above. Thus, the Court is in position to apply relevant case law to the facts and resolve those issues in this case.[3/]

III. FACTUAL BACKGROUND

A. The 1985 Clean Water Act Removal Action at the Krewatch Farm Site

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[3/] If judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court "shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted," and issue an appropriate order for conducting the trial. Fed. R. Civ. P. 56(d).

1. The Fire at the Krewatch Farm Site and Initial Response Activities (1985)

On April 9, 1985, there was a fire at a farm near Seaford, Delaware, that was owned by Ed Krewatch ("Krewatch Farm Site" or "Site"). *Federal On-Scene Coordinator's Report (at Section (§) II, ¶ A), attached hereto as Exhibit 1.* The Site is adjacent to a tributary to the Nanticoke River, which empties into the Chesapeake Bay. *Id., at § II, ¶ B.* Over the years, Mr. Krewatch had accumulated military surplus oils and greases on a three acre parcel at the southern portion of his farm. *Id., at "FACTS SHEET" and § II, ¶ B.* Oil was released during the fire; thus, the local fire department called in DNREC. *Id., at § II, ¶ A.* In turn, DNREC contacted the Regional Response Center at Region III of EPA two days later to report the oil spill. *Id.*

EPA sent a Technical Assistance Team ("TAT") contractor to the Site on April 15, 1985, to conduct a Preliminary Assessment. *Id.* To protect the stream adjoining the Site from pollution, EPA's OSC contacted the United States Coast Guard on June 13, 1985, to activate the United States' response authority under Section 311(c) of the Clean Water Act, 33 U.S.C. § 1321(c). *Id.*[4/] From

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[4/] Section 311(k) of the CWA, 33 U.S.C. § 1321(k), Repealed. Pub. L 101-380, Title I, § 2002(b)(2), August 19, 1990, 104 Stat. 507, provided for a $35 million revolving fund which could be used to respond to oil spills. Provisions allowing funding by the Oil Spill Liability Trust Fund ("OSLTF") are now found in Section 311(s) of the CWA, 33 U.S.C. § 1321(s). The OSLTF is administered by the Coast Guard.

EPA's decision in 1985 as to which fund to access – the Superfund or the revolving CWA fund – was delayed because EPA did not know, until sufficient samples had been analyzed, whether early analyses of samples showing significant levels of polychlorinated bi-phenyls ("PCBs") at the Site were correct. They were not; thus EPA sought and received access to CWA funds because the significant threat to the environment was the potential for oil pollution, not contamination with hazardous substances, as defined in Section 101(16) of CERCLA, 42 U.S.C. § 9601(16), at the Site. *Id., at §§ II.A and VII.B.*

planning until completion, EPA's CWA Response Action took 3½ months. On-site cleanup work consumed only 1½ months and was completed July 29, 1985. *Id., at § VI, ¶ A.2.* EPA removed and disposed of 730 tons of soil and debris that were contaminated with oil, sent 800 gallons of oil products to be recycled, repackaged 4,000 gallons of oil products, and secured the repackaged products as well as 2,000 small containers of oil at the Site. *Id., at § VI., ¶ B.* Approximately seventy (70) 55-gallon drums of oils and greases were secured on site because of the high cost of sending them to a landfill or recycling them. *Id., § VII, ¶ C.*

2. The Drum Burial Area

On July 24, 1985, five days before completion of the CWA response action, EPA's TAT contractor conducted magnetic surveys in four areas of the Site where EPA suspected that drums had been buried. *Memorandum ("Memo"), Tucker - Habrubowich, dated 6/1/87, attached hereto as Exhibit 2.* The contractor found that a location described as "Area A" contained "a large amount of buried iron," but that Areas "B, C, and D" did not.[5/] *Exhibit 2, at first attachment within exhibit (Memo Tucker - Rodstein, dated 8/5/85).* Area A, which EPA has since referred to as the "Drum Burial Area," was separated from the rest of the Site by a large sweet potato field. *Exhibit 2, at Map 1 (first attachment to Tucker - Rodstein Memo, within Exhibit 2).* On July 21, 1985, Ed Krewatch had advised EPA's OSC that an "asphalt company (from Seaford)" disposed of drums at that location and that Tony Nero, a local resident, "was [the] hauler." *See Logbook of Krevatch [sic] Site,*

[5/] A sketch of the Site dated July 30, 1985, notes "buried drums" in Area A. Area B contained "no metal." Area C, "The Gulch," contained two locations with a small amount of buried iron. Area D is described as "The Pit," and Area E was a junk yard. *Exhibit 2, at Map 1 (first attachment to Tucker - Rodstein Memo, within Exhibit 2)*

Seaford, DE, Tharp Road Site (at p. 15), attached hereto as Exhibit 3. The OSC obtained a telephone number and address for Mr. Nero, but "was not able to contact [him]." *Id., at 42; Exhibit 1, § II C, and § IV (events of 07/27/85).*

EPA's Federal On Scene Coordinator's Report for the 1985 Response Action describes the Drum Burial Area as "a suspicious area purported to contain drums of road tars." *Exhibit 1, § VII, ¶ D.* The Report continues:

> A magnetometer survey showed the presence of a considerable amount of iron in a particularly suspicious area of the property. A trench was dug with a backhoe during the CWA activity and revealed what appeared to be a drum burial area. Contents of the drums were visually assessed as tar. A sample of a drum on the surface in the area in question was analyzed as part of the preliminary assessment and results did not show significant quantities of hazardous substances. The site does not presently pose an immediate or significant risk of harm to human health or the environment, nor does it pose a threat or [sic] impact to surface waters of the United States. *Id.*

Since the Drum Burial Area posed no threat of impact to surface waters, the CWA response could not "cover additional work" at the Site. *Exhibit 3, at 44.* Since it was unclear, however, whether the drums posed a risk to groundwater, the OSC referred the Area to EPA's "Site Investigation and Support Section for potential action under CERCLA's remedial provisions." *Id.; Exhibit 1, at § VII, ¶ D.*

The Coast Guard incurred $94,567.57 in response costs at the Krewatch Farm Site. *See Letter, McEllen - Krewatch, dated 2/23/87, and enclosed statement of claim, attached hereto as Exhibit 4.* Some funds were spent under CERCLA "to assess suspicious areas." *Exhibit 1, § 1 ("Introduction"), ¶ A.* The Coast Guard billed Ed Krewatch's estate for the response costs. *Exhibit 4.* As of the date of this filing, EPA has been unable to determine whether the Coast Guard's costs

were paid, whether the amount of CERCLA funds expended in 1985 to investigate suspected drum burial areas at the Site was ever quantified, or whether anyone was billed for those 1985 CERCLA costs, limited as they necessarily were. *Declaration of Natalie Katz, attached hereto as Exhibit 5, at ¶ 11.*

3. Arrangements by GACNJ and Hyer to Dispose of Wastes Containing Hazardous Substances at the Drum Burial Area

In the 1970s, Egyptian Laquer Company operated a manufacturing plant in Kearny, New Jersey ("Kearny Plant"). *Initial Questionnaire/ Memorandum of Agreement Application (at ¶ F), attached hereto as Exhibit 6.* In 1979, the Kearny Plant was sold to Sam Tuttle, and he, in turn, sold the Plant to Hyer, who began operating the Plant in 1981 under the name Gardner Asphalt Corporation. *Id., at ¶¶ B, F.*

During the summer of 1981, representatives of the New Jersey Department of Environmental Protection ("NJDEP") had serious concerns about waste handling practices at the Kearny Plant. Tom Leonard of NJDEP wrote to Bob Reed of the same agency on July 17, 1981, stating that Gardner Asphalt Company's Kearny plant and one other facility unrelated to Gardner had been improperly handling waste, had been cited for waste handling violations at least twice, and that NJDEP must take the matter further. *Memo, Reed-Leonard, dated 7/17/81, attached hereto as Exhibit 7.* Reed wrote in turn to Ron Corcory, also of NJDEP, on July 28, 1981, that Leonard had told him that both facilities were "a mess" and suggested that someone from NJDEP should inspect the facilities in the near future. *Memo Reed - Corcory, dated 7/28/81, attached hereto as Exhibit* 8.

In June 1978, Hyer purchased a plant in Seaford that manufactured roof coatings and driveway sealants. *Loan Application of Emulsion Products to Delaware's Hazardous Substance Cleanup Program (at p. 1), attached hereto as Exhibit 8a.* In or around July 1981, Debtor GACNJ sent approximately 200 drums of "foul smelling drummed liquids" from the Kearney Plant to Emulsion's plant in Seaford, Delaware. *Memo, Buckson-Hyer, 7/7/81 (w/ notation, 7/11/81), attached hereto as Exhibit 9.* Emulsion's President, Newlin Buckson, wrote to Hyer on July 7, 1981, telling Hyer that "John Cannon" had told Buckson that he was "to bury [the drums] on the Seaford property." *Id.*[6] Buckson stressed to Hyer that it was against EPA rules to bury drums "in unauthorized burial sites" and asked if it would not "be wiser to spend a few bucks & send it to a proper landfill." *Id.* (emphasis in original). Hyer's answer, on July 11, 1981, was "bury it!" *Id.* Buckson and another former Emulsion employee, Tom Short, have confirmed to investigators that the Kearny Plant shipped many drums of foul-smelling waste to Emulsion's plant.[7] *Buckson Interview Summary, 12/5/00, attached hereto as*

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[6] John Cannon likely was the Plant Manager of the Kearney Plant in July, 1981. *RCRA Inspection Form prepared by Bob Dante of NJDEP, documenting inspection dated 12/1/82 (at p. 1), Exhibit 10; Letter from John Cannon, Plant Manager of Gardner Asphalt Company, Kearny, to EPA, Region II, dated 12/1/82, attached hereto as Exhibit 11.*

[7] Mr. Buckson is now deceased. Prior to his death, the United States had attempted, over the opposition of Debtor-Defendants and Emulsion, to obtain Buckson's deposition under Fed. R. Civ. P. 27. In early April, 2001, shortly before Buckson was hospitalized, with the knowledge from his physician that his illness was life-threatening, the United States proposed taking Buckson's deposition to memorialize his sworn testimony. *Letter, Kinney-Bradley, 4/5/01, attached hereto as Exhibit 12.* The United States advised Debtor-Defendants and Emulsion of Buckson's health problems. *Id.* Nevertheless, Debtor-Defendants refused to participate in a Rule 27 deposition. On April 13, 2001, the United States filed a Petition to Perpetuate Testimony so that Buckson's testimony could be obtained prior to any incapacitation from illness. *Verified Petition of the United States to Perpetuate Testimony, attached hereto as Exhibit 12a.* The Debtor-Defendants and Emulsion, in papers filed with the U.S. District Court for the District of Delaware, opposed the deposition, arguing

Exhibit 18; Exhibit 17, Short Declaration (see n. 7, immediately above).

Approximately two months after the Hyer directive, Emulsion contracted with Antonio ("Tony") Nero to dispose of a large number of drums, which allegedly contained "waste asphalt and offtest emulsions." *Contract, 8/31/81, executed by Buckson and Nero, attached hereto as Exhibit 19.* Nero has admitted that he arranged for waste to be shipped from the Emulsion Plant and to be

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that "[i]t is fair to say that all parties know the sum and substance of what ... Buckson would say." *Letter, Winchester/Bradley-Hon. Roderick R. McKelvie, 4/25/01 (at p. 4), attached hereto as Exhibit 12b.* Debtor-Defendants and Emulsion also required a full round of briefing and supplementation of the record with objective, sworn medical evidence of Buckson's life-threatening condition.

On May 1, 2001, in a teleconference with the court, without requiring further proof, testimony, or argument, the court summarily granted the United States' petition to take Buckson's (and Anthony Nero's) testimony. Buckson's condition worsened and he proceeded into his second month of hospitalization. *Affidavit of John H. O'Neill. Jr., D.O., 4/30/01, attached hereto as Exhibit 13.* Counsel for Hyer did not agree to a date for deposition until the afternoon of May 17th, although previously counsel had tentatively agreed to a May 3rd date. *Exhibit 12a, at proposed order; Letter, Kinney - Bradley, 5/10/01, attached hereto as Exhibit 14.* On the morning of May 17th, via the medical and hospital risk management staff, Buckson indicated he was not feeling up to having the deposition proceeding that day. Buckson went into a coma the following day and never woke up prior to death. *Exhibit 5, at ¶ 13.*

Although Buckson is not available to testify, three witnesses – Delores Rust, Officer William McDaniel of DNREC, and Thomas Short – authenticate Exhibit 9 (Buckson's Memo of July 7, 1981 documenting the delivery of GACNJ waste to Emulsion and containing the July 11 notation of Hyer's order that the Emulsion bury the waste) and a contract Buckson entered into with Tony Nero to dispose of drums of waste received from Kearney (Exhibit 19, referred to immediately below in Section IV.A.3 of this Memorandum). Their affidavits are more than adequate to meet the authentication requirements of Fed. R. Evid. 901. *See Affidavit of Delores Rust, dated 11/26/01, attached hereto as Exhibit 15; Affidavit of William McDaniel, dated November 26, 2001, attached hereto as Exhibit 16; Declaration of Thomas Short, dated June 17, 2002, attached hereto as Exhibit 17.* Exhibits 9 and 19 are admissible into evidence, under the business record exception to the hearsay rule, the ancient documents rule, and the residual hearsay exception. See Fed. R. Evid. 803(6), 803(16) and 807.

disposed of at the Krewatch Farm.[8/] *Transcript of Deposition of Tony Nero, dated 5/4/01 (at pp. 18-30, 47-48, 53-54, 57, 64-70, and 73-75), attached hereto as Exhibit 20.* Further, Nero was at the Krewatch Farm when the waste arrived, and has stated that he passed a check for $1,500 from the driver of the truck to Ed Krewatch. *Id., at 30, 53, 74-75.*

Hazardous substances found in the drums and contaminated soils at the Drum Burial Area of the Krewatch Farm Site are similar to the hazardous substances used previously by Egyptian Lacquer at the Kearny Plant, and are similar to substance found in drums, cans and contaminated soils at the Emulsion Plant in Seaford, Delaware.[9/] *Exhibit 8a, at p.2 (information listing hazardous substances disposed by Emulsion); Declaration of Maria Pino, dated 6/15/02, attached hereto as Exhibit 21; Cover letter from Paul A. Bradley to Judith M. Kinney, dated 1/17/01, and enclosed Material List reflecting materials formerly used by Egyptian Lacquer, attached hereto as Exhibit 22; GAC Quality Roof Coatings and Cements - List of Raw Materials used at Kearny, NJ Plant and Seaford, DE Plant from 1979 - Present, attached hereto as Exhibit 23.* Substances common to

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[8/] The United States has claims against Hyer and GACNJ, notwithstanding that there is no proof either specified that drums were to go to Krewatch's Drum Burial Area, because a party does not have to choose where its hazardous substances are to be disposed in order to be liable as an "arranger" under Section 107(a)(3) of CERCLA. *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1381-82 (8th Cir. 1989)(string citation omitted).

[9/] CERCLA case law has established that "it is unnecessary to 'fingerprint' a particular generator's waste in order to establish the liability of that generator." *US v. Monsanto Co.*, 858 F. 2d 160, 169 (4th Cir. 1988); *US v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir 1992); *U.S. v. Wade*, 577 F. Supp. 1326, 1332-22 (E. D.Pa.1983). It is enough to show that hazardous substances like those contained in the generator-defendant's waste were found at the site. *Monsanto*, 858 F. 2d at 169.

the Kearney plant and the Drum Burial Area include: acetone, aluminum, 2-butanone (methyl ethyl ketone), cadmium, calcium, chromium, copper, ethylbenzene, iron, lead, methylene chloride, 4-methyl-2-pentanone (methyl isobutyl ketone or hexone), naphthalene, silver, sodium, trichlorethene (trichloroethylene), and zinc. *Exhibit 21, at ¶ 19.*

B. Activities Involving the Site, Including at the Drum Burial Area, in 1987-88

On May 18, 1987, the TAT team met with Joel Karmazyn of EPA Region III, DNREC officials, and a Field Investigation Team ("FIT") staffed by NUS Corporation, another EPA contractor. The TAT team described to the others in attendance the four areas of the Krewatch Farm Site that were included in the 1985 magnetic investigations. *Exhibit 2.*[10/] The TAT team recommended no further action at the Site for EPA's "ERS" [Emergency Response Section] unless hazardous materials were discovered. *Id.* The FIT team recommended that EPA should make a policy decision as to whether CERCLA funds should be expended to investigate the Site further. *See Non-Sampling Site Reconnaissance Summary Report, dated 7/28/87 (at Cover Letter, p. 1), attached hereto as Exhibit 24.*

EPA asked DNREC to conduct a follow-up investigation of the Drum Burial Area. On November 4, 1987, DNREC conducted a Site Inspection Follow-Up, which included five soil samples from the Drum Burial Area and a sample from an open drum which contained a substance resembling roofing tar. *A Site Inspection Follow-up of Seaford Drum Site, March 1988 (at § 5), attached hereto as Exhibit 25.* DNREC's "HNu" meter did not detect any organic vapors in the Drum Burial

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[10/] *See Cover Memo, at ¶ entitled "PRESENT INVESTIGATION."*

Area. *Id.* DNREC also sampled the separate drum storage area, where the seventy 55-gallon drums of oil and grease had been stored as a result of the 1985 CWA removal action. *Id.* The "HNu" meter produced a 50 ppm reading while one of the drums in the drum storage area was being sampled. *Id.*

An EPA toxicologist reviewed DNREC's Site Inspection Follow-up Report and concluded, on December 12, 1988, that it revealed "no contaminants at levels of toxicological concern." *Memo, Ioven - McCreary and Racette, attached hereto as Exhibit 26.* She concluded that "the site seem[ed] to be relatively innocuous" at that time, although the possible effect of future degradation of on-site drums could not be predicted. *Id.* As to the single elevated HNu reading recorded during the collection of one sample from the drum storage area, she observed that "HNu meters are designed to detect organic vapors in the atmosphere; however a distinction between vapor types is not made by this detector." *Id.* Moreover, the quantitative sampling results did not identify any organic contaminants consistent with the HNu reading. *Id.* She concluded that noteworthy sampling results were "isolated occurrences" and that most of the contaminants found were of a "relatively low order of toxicity." *Id.* Thus, "no threat to human health or to the environment [was] anticipated." *Id.*

C. Events Beginning in 1994

In 1990, the State of Delaware passed the Delaware Hazardous Substance Cleanup Act, 7 Del.C. § 9101 *et seq.* ("HSCA"), a statute analogous to CERCLA, which authorized DNREC to clean up sites containing hazardous substances by taking direct action, or by ordering responsible parties to perform the cleanup. Pursuant to HSCA, DNREC revisited the Drum Burial Area in 1994, sampled some drums and soil there, and found 100,000 parts per million ("ppm") of petroleum hydrocarbons and 200 ppm of polyaromatic hydrocarbons. *DNREC Report of Findings Krewatch Farm Site,*

March 21, 1995 (at § 8.0, p.3), attached hereto as Exhibit 27. DNREC decided, under HSCA, that further action was needed at the Drum Burial Area. *Cover Letter for Proposed Consent Order with Emulsion, 12/1/95 (at p.1), attached hereto as Exhibit 28.* Therefore, DNREC notified Emulsion on December 1, 1995 that Emulsion was liable to clean up the Drum Burial Area under Delaware law. *Id.* Debtor-Defendant Gardner then stepped forward and entered into a Voluntary Cleanup Agreement with DNREC, on January 17, 1996, to clean up the Drum Burial Area. *Agreement, attached hereto as Exhibit 29.*

Gardner hired WIK Associates, Inc. ("WIK") to "conduct a Remedial Investigation and Drum Removal Interim Action," at the Drum Burial Area. *Cover Letter, Lannan - Langseder, dated 6/21/96, and Remedial Investigation and Drum Removal Interim Action Work Plan, attached hereto as Exhibit 30.* Gardner's environmental manager, Joseph Clemis, took part in the removal action. In September, 1996, during Gardner's removal activities, Clemis punctured drums while operating a front end loader used to excavate the drums. Free flowing liquid waste consisting of a laundry list of hazardous substances flowed from the drums back into the excavation.[11/] *Video tape of WIK and GAC, taken on or about 9/9/96, attached hereto as Exhibit 31; Memo, Kelly-Voltaggio, Request for a Removal Action, 5/20/97 (at pp. 3-4), attached hereto as Exhibit 32.* After discovering that the required cleanup would be more expensive than envisioned, Gardner decided on

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[11/] As a result of these mistakes, and other improper removal behavior, the United States contends that Gardner is liable for response costs as an "operator" of the Drum Burial Area, under Section 107(a)(2) of CERCLA, at the time hazardous substances were disposed there in 1996. This is true irrespective of any ruling by this Court as to when the United States' claim arose regarding GACNJ's liability based upon its 1981 arrangement for disposal. The parties have reserved this issue for resolution at a later date. *Order Granting Continuance, etc., dated 4/22/02.*

September 23, 1996, not to continue with the cleanup. *Id.; Pollution Report ("POLREP") # 1, Krewatch Farm, 11/20/96 (at ¶ D), attached hereto as Exhibit 33.* Following negotiations with DNREC, Gardner closed down the Drum Burial Area site on or about October 15, 1996. *Letter from WIK to Joe Clemis of GAC, dated 12/2/96, and attachment (at pp. 5-6), attached hereto as Exhibit 34.*

In September, 1996, anticipating Gardner's abandonment of the cleanup, DNREC asked for EPA's assistance in assessing environmental conditions at the Drum Burial Area and evaluating the feasibility of taking over the aborted cleanup. *Letter, Kalbacher-Carney, 9/27/96, attached hereto as Exhibit 35; Federal On-Scene Coordinator's After-Action Report, for Krewatch Farm Site, 20 August 1997 to 1 October 1997 (at p.1), attached hereto as Exhibit 36.* Through its subsequent involvement at the Drum Burial Area, EPA came to know (as it did not in December, 1988, when its toxicologist had concluded that the Site was "relatively benign") that some of the drums in the Drum Burial Area contained free flowing liquid waste consisting of numerous hazardous substances and that many of the drums were in a deteriorated condition. Thus, on April 21, 1997, EPA asked the Agency for Toxic Substances and Disease Registry ("ATSDR"), a branch of the Centers for Disease Control, to evaluate the analytical data obtained by DNREC at the Drum Burial Area in 1996. *ATSDR Package, Krewatch Farm Drum Burial Site, attached hereto as Exhibit 37.* ATSDR concluded that allowing the drums to remain buried posed a potential threat to human health through the possible contamination of groundwater and drinking wells. *Exhibit 36, at p. ii.* In the meantime, on October 3, 1996, DNREC had ordered Emulsion to perform the cleanup. *Imminent Danger Order, Krewatch*

Farm Site, October 3, 1996, attached hereto as Exhibit 38. Neither Gardner nor Emulsion complied with the Order. *Exhibit 32, at p. 3.*

EPA invoked its response authority under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), and the National Contingency Plan, 40 C.F.R. Part 300, and conducted a "removal action" during the period June 16 through October 1, 1997, that resulted in the cleanup of the Drum Burial Area. *Exhibit 36, at p. ii.* To date, EPA has incurred response costs at the Drum Burial Area slightly in excess of $1,000,000. *Cost Report dated 5/9/02, attached hereto as Exhibit 39.*[12/]

IV. ARGUMENT

A. Plaintiff's Claims – Against Hyer, Gardner and Emulsion for Response Costs Incurred Beginning in 1996 Relating to the Drum Burial Area – Arose in 1996.

1. Law as to When CERCLA Claims Arise

The question before this Court – when do claims for CERCLA cleanup costs arise when they are incurred post-confirmation but based upon a debtor's pre-petition disposal activities – has been described by at least one circuit court as "a very difficult issue." *In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 3 F.3d 200, 201-02 (7th Cir. 1993) (*"Chicago II"*). The goals of CERCLA and bankruptcy may conflict in certain cases. CERCLA seeks "to protect public health and the environment by facilitating the cleanup of environmental contamination and

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[12/] The United States will receive a minimum of $152,000 from the Krewatch Partnership, which administers Krewatch's estate, and $10,000 from Tony Nero. When the Krewatch Partnership sells the Site, the United States will receive 40% of the sale proceeds, up to $228,000. Therefore, the maximum that the United States will receive in settlements with potentially responsible parties other than the Debtor-Defendants and Emulsion is $390,000. *Consent Decree (at ¶ 5), attached hereto as Exhibit 40.*

imposing costs on the parties responsible for the pollution." *In re Jensen*, 995 F.2d 925, 927 (9th Cir. 1993). Under Section 104(a) of CERCLA, EPA is required to focus primarily on those releases "which the President deems may present a public health threat." 42 U.S.C. § 9604(a).

In contrast, the Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 ("Bankruptcy Code"), is "designed to give a debtor a 'fresh start' by discharging as many of its 'debts' as possible." *In re Jensen*, 995 F.2d at 928. In cases where the goals of CERCLA and the Bankruptcy Code appear to conflict, the Supreme Court has "indicated" that, if possible, the statutes' objectives should be reconciled. *Id., citing, inter alia, Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494 (1986), and *Ohio v. Kovacs*, 469 U.S. 274 (1985). Under the facts at bar, the Court should reconcile the statutes' objectives by deferring to CERCLA's policies that the President must focus primarily on sites which pose a public health threat, and clean those sites expeditiously. This approach avoids the bizarre result that EPA must devote its resources primarily to ferreting out all parties who might be liable for *any* discovered release of a hazardous substance, even where such release(s) pose no imminent threat to public health or the environment and EPA has no knowledge that a debtor is related to such release.

The leading tests as to when CERCLA claims arise were first articulated in two 1992 decisions – *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, 974 F.2d 775 (7th Cir. 1992) ("*Chicago I*") and in *In re National Gypsum Company, et al*, 139 B.R. 397 (N.D. Tex. 1992). Under the *Chicago I* test, a CERCLA claim arises "when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant *knows* will lead to

CERCLA response costs . . ." *Chicago I*, 974 F.2d at 786 (emphasis supplied).[13/] Under the "fair contemplation" test, first articulated in *National Gypsum* by District Judge Barefoot Sanders, "[t]he only meaningful distinction that can be made regarding CERCLA claims in bankruptcy is one that distinguishes between costs associated with pre-petition conduct resulting in a release or threat of release that could have been 'fairly' contemplated by the parties; and those that could not have been 'fairly' contemplated by the parties." *In re National Gypsum*, 139 B.R. at 407-08. In sum, wrote Judge Sanders, future response costs "based on prepetition conduct that can be fairly contemplated by the parties at the time of Debtors' bankruptcy are claims under the Code." *Id., at 409.*

Applying the *Chicago I* test, the Seventh Circuit has twice ruled since 1992 on when CERCLA claims arise. In *Chicago II*, the court ruled that a CERCLA claim arose prior to the effective date of debtor's reorganization where the plaintiff: had purchased property from the debtor several years before plan confirmation knowing that the property was heavily contaminated with oil; and at least should have known from publicly available documents years prior to plan confirmation that the property was a part of a Superfund Site widely publicized as one of the ten most contaminated sites in the United States. *Chicago II*, 3 F.3d at 203-04. Under these circumstances, the court concluded that plaintiff

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[13/] In *Chicago I,* Debtor's reorganization plan was consummated November 12, 1985, approximately 60 days after the bar date for administrative claims. The Washington State Department of Transportation ("WSDOT") had purchased property from debtor's trustee in 1984. A sister state agency learned in June or July, 1985, that hazardous substances had been released onto the property prior to the sale. By August 16, 1985, WSDOT knew that the contamination was "an extremely hazardous waste which would need to be treated, stored, and/or disposed at a permitted hazardous waste facility." WSDOT received confirmation of this, through sampling results, on November 26, 1985. *Chicago I*, 974 F.2d at 777-79. The court held, under these facts, that WSDOT had sufficient information "to give rise to a claim or contingent CERCLA claim." Id., at 787.

was a prospective claimant who could "tie the bankruptcy to a known release of a hazardous substance" prior to consummation of debtor's plan. *Id.* at 207.

The Seventh Circuit next faced the issue of when CERCLA claims arise in *AM International, Inc. v. Datacard Corporation, DBS, Inc.*, 106 F.3d 1342 (7th Cir. 1997), where the court found that Datacard's claims against AM International ("AMI") arose after AMI's discharge and, thus, were *not* discharged. AMI had operated a tank farm for 22 years at its Holmesville, Ohio facility, where there had been a long history of spills of a cleaning solvent. In 1981, AMI sold most of the Holmesville site to DBS Inc., but kept ownership of the tanks. AMI leased the tank farm grounds back from DBS. *Id.* DBS hired many employees of AMI, including one who had a written warning in his file for causing a large spill of solvent at the tank farm in 1971. *Id.*, at 1346, 1348. AMI filed its Chapter 11 bankruptcy petition in 1982, continued operating the tank farm (and spilling solvent), confirmed its reorganization plan in September 1984, and finally closed the tank farm down in May 1985. *Id.*, at 1346.

In 1986, Datacard bought DBS. During its due diligence, Datacard had discovered a 12 inch layer of solvent on groundwater under the Holmesville facility. *Id.* Datacard siphoned the solvent off the groundwater and notified AMI that it intended to obtain an injunction against it requiring AMI to perform further cleanup. *Id.* AMI, claiming that DBS should have filed a claim in AMI's 1982 bankruptcy, sought a declaratory judgment that Datacard's claims had been discharged. *Id.*[14/] AMI claimed that all DBS had needed to do to find out about the tank farm contamination was to review the

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[14/] By the time the district court ruled, AMI had gone into bankruptcy once again, in 1993. Id., at 1346.

files of former AMI employees who were hired by DBS, among them the employee who spilled solvent in 1971 and received a written warning as a result. The Seventh Circuit disagreed and affirmed the district court's factual finding that DBS had not had sufficient information to tie AMI to environmental contamination before AMI's reorganization plan was confirmed and the court's legal conclusion that Datacard's CERCLA claims against AMI had not been discharged. *Id.*

The Fifth Circuit adopted a truncated version of the *Chicago I* rule in *In the Matter of Crystal Oil Company*, 158 F.3d 291 (5th Cir. 1998). On February 25, 1986, the Louisiana Department of Environmental Quality ("LDEQ") received a citizen complaint about the "Shoreline site" which had been owned from the late 1920's until 1965 by Crystal Oil and Refining Corporation ("CORC"), a predecessor of Crystal Oil Company ("Crystal"). *Id.*, at 293. Shortly afterward, an LDEQ employee inspected the site and discovered faulty tanks, faulty gathering lines, and oil oozing out of the ground. *Id.* There was a rusted sign that read "Crystal Oil Company" at the edge of the site. *Id.* Another LDEQ employee spoke with Crystal's environmental compliance officer ("ECO") in May, 1986 to try to learn whether the "Crystal Oil Company" that appeared on the sign was Crystal. *Id.*, at 293-94. Crystal's ECO asked Crystal's corporate secretary to investigate. *Id.*, at 294. The corporate secretary concluded, based upon a search of in-house records, that there was no demonstration that Crystal had owned the land.[15] *Id.* After an additional contact with LDEQ, and more deliberations with the corporate secretary, Crystal's ECO sent a letter to LDEQ stating that, based on research of available

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[15] When Olin bought the site, CORC transferred all land records associated with the site. Crystal did not search those archived records.

records then in Crystal's possession, "no information was found indicating that this company ever owned or operated such a facility." *Id.*

It is important to note that LDEQ knew by that time that there was a "significant environmental problem that could result in liability to previous owners of the land," and, through a title search, that CORC had owned the site. *Id.* In addition, LDEQ suspected that Crystal was CORC's successor but, because multiple Crystal Oil companies existed, it was not sure. *Id.* Crystal had been in bankruptcy for 21 days when its ECO sent his ambiguous letter to LDEQ. *Id.*, at 294-95. Crystal did not list LDEQ as a creditor on its bankruptcy schedules or send LDEQ notice of the claims bar date; whether LDEQ had any knowledge of Crystal's bankruptcy was disputed. *Id.*, at 295.

Crystal did not hear again from LDEQ until over seven years after entry of the order confirming its reorganization plan, when LDEQ sent Crystal a letter saying that Crystal was a potentially liable party regarding the site. *Id.*, at 294-95. After receipt of LDEQ's letter, Crystal filed a motion to reopen its bankruptcy case, asserting that any claims of LDEQ had been discharged. *Id.*

The court adopted an abbreviated version of the Seventh Circuit's *Chicago I* test, stating that "a regulatory environmental claim will be held to arise when 'a potential [regulatory] claimant can tie the bankruptcy debtor to a known release of a hazardous substance.'" *Id.*, at 296.[16/] In the case before it, the court posed the question as "whether, at the time of bankruptcy, LDEQ could have ascertained

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[16/] The court did not complete the quote from *Chicago I*. The relevant remaining language, following "hazardous substances," is "which the potential claimant knows will lead to [regulatory] response costs, and when this potential claimant has, in fact, conducted tests with regard to this contaminated property, then this potential claimant has, at least, a contingent [response cost] claim for purposes of [bankruptcy]." *Chicago I*, 974 F.2d at 786.

through the exercise of reasonable diligence that it had a claim against Crystal for a hazardous release at the Shoreline site." *Id.* The bankruptcy court ruled that LDEQ had adequate notice of releases of hazardous substances at the site during the time Crystal was in bankruptcy and that LDEQ should have continued its investigation as to Crystal's successorship to CORC by searching the records of the Louisiana Secretary of State, where mergers and name changes are "easily ascertained." *Id.*, at 296-97. The Fifth Circuit ruled that these factual findings were not clearly erroneous and found, based upon them, that LDEQ could have tied Crystal to a known release of a hazardous substance. *Id.* Thus, LDEQ's claim had arisen prior to Crystal's discharge in bankruptcy.

In *Jensen*, the Ninth Circuit adopted the *National Gypsum* "fair contemplation" test for determining when claims for environmental response costs arise. The Ninth Circuit has determined that the fair contemplation test "carefully balanced" the "sometimes competing goals of environmental law and the bankruptcy code." *Jensen*, 995 F.2d at 930. The court ruled that the California Water Board's knowledge in January, 1984 – that potential releases from a 5,000 gallon dip tank of fungicide on the Jensens' property could cause serious environmental harm – was attributable to a sister agency, the California Department of Health Services ("DHS"). Thus, DHS had a pre-petition, dischargeable claim in the Jensens' bankruptcy, for response costs DHS began to incur in 1987, more than two years following the completion of the Jensens' Chapter 7 liquidation proceeding. *Id.*, at 930-31.[17] In

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[17] Two other circuit courts – the Second and Third – have adopted different tests. No circuit courts have followed the Second Circuit's decision in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). There the court ruled that a cost recovery claim under CERCLA can be discharged if it arises from debtor's pre-petition conduct and if there were pre-petition releases or threatened releases of hazardous substances. *Id.*, at 1005. Also standing alone is *In re Reading Company*, 115 F.3d 1111 (3d Cir. 1997), where the Third Circuit ruled that a hypothetical claim of the United States under

National Gypsum, Judge Sanders had included among factors bearing upon whether costs could have been fairly contemplated "knowledge by the parties of a site in which a PRP may be liable, NPL listing, notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs." *In re National Gypsum Company*, 139 B.R. at 408.

Although there are no 11th Circuit opinions addressing when CERCLA claims arise,[18] the Honorable Lenore Nesbitt of the United States District Court for the District of Florida addressed the issue in *NCL Corp. v. Lone Star Building Centers (Eastern), Inc.*, 144 B.R. 170 (S.D. Fla. 1992). In NCL Corp., Lone Star counterclaimed for contribution against NCL to help pay for a CERCLA cleanup of contaminated real estate. The property was owned by Lone Star for 17 years, sold to another party in 1979 and leased by Lindsley's Stores, Inc. ("Lindsley") or its successors from 1979-1989, when the lease was assigned to NCL. Lindsley entered Chapter 11 bankruptcy in 1985 and its reorganization plan was confirmed in 1986. During the 17 years the property was owned by Lone Star, lumber was regularly treated there with chemicals which allegedly dripped onto the ground. Lindsley allegedly contaminated the property when it dismantled the lumber treating facilities and conducted other activities which allegedly contaminated the site. *Id.*, at 173.

CERCLA was dischargeable because all elements of a CERCLA claim were present during the three weeks in December, 1980, between the statute's enactment and consummation of the Reading Railroad's reorganization plan.

[18] At least one court has found the "fair contemplation" test to be interchangeable with a test articulated by the 11th Circuit in *In re Piper Aircraft, Corp.*, 58 F.3d 1573 (11th Cir. 1995), for determining when product liability claims arise. See, e.g., *In re Hassanally*, 208 B.R. 46, 52 (9th Cir. BAP, 1997) (fair contemplation test equivalent to "conduct plus," "prepetition relationship," or *Piper* test).

Judge Nesbitt found that whether she applied the test articulated in *In re Chateaugay*, 997 F.2d at 1004, or Judge Sanders' "fair contemplation" test in *National Gypsum,* Lone Star's claim against Lindsley had arisen pre-petition and, thus, had been discharged. She based her conclusion on Lone Star's installation and operation of the dip tanks, terms in the lease requiring Lindsley to abide by applicable environmental regulations and to permit Lone Star to inspect the property, and that Lone Star had participated in Lindsley's bankruptcy and filed claims, but chose not to file a contingent unliquidated claim regarding the contamination. *NCL Corp.*, 144 B.R at 177. She also compared the case to *National Gypsum*, "where claims for [releases] the EPA had some knowledge of, but chose not to file, were discharged. Id.

In addition, there is an unpublished Order of Summary Judgment on point in *United States v. Ben Shemper & Sons, Inc., et al.*, C.A. No. 94-50385\LAC (N.D. Fla. October 2, 1997) *(slip op. attached as Exhibit 41)*. In *Ben Shemper*, which most closely resembles the case at bar, District Judge Lacey A. Collier found that EPA's claim against Taracorp, Inc., for arranging to dispose of hazardous substances at the Sapp Site in 1978-79, did not arise until EPA learned of the arrangement for disposal in 1990 when it obtained the operator's business records. *Id.*, at 18-19. Taracorp entered bankruptcy in 1983 and emerged, reorganized, in 1985. *Id.*, at 18. EPA knew of Taracorp's bankruptcy and its involvement at two other sites. *Id.* EPA first addressed the Sapp Site through a CWA cleanup in 1980 and placed the site on the NPL in 1982. *Id.* In ruling for the United States, the court required more than "a mere regulatory relationship between EPA and Taracorp" for a contingent claim to exist. *Id.*, at 18-19. "Holding otherwise would too easily defeat CERCLA's purpose of rapid cleanup." *Id.*, at 19.

2. Plaintiff's Claim Against Emulsion – for Response Costs Incurred Beginning in 1996 Relating to the Drum Burial Area – Arose in 1996.

In this case, as of December 1988 EPA did not anticipate performing a CERCLA cleanup at the Drum Burial Area. Understandably, EPA did not follow up on information its OSC for the CWA cleanup had received in 1985 that an "asphalt company" from Seaford had caused drums to be buried there. Instead, DNREC, a Delaware state agency, returned in 1994 to the Krewatch Farm Site to investigate the Drum Burial Area. In the meantime, the Debtor-Defendants had entered Chapter 11 bankruptcy in 1992 and emerged reorganized in 1993.

DNREC determined, based upon sampling results it obtained during its 1994 investigation, that the Drum Burial Area needed to be investigated further and that the buried drums needed to be removed. Pursuant to Delaware state law, DNREC notified Emulsion that it was liable and would be required to perform the work. Gardner then stepped forward and volunteered to perform the cleanup. When the cleanup turned out to be more expensive than Gardner had envisioned, Gardner terminated the cleanup and left the Site. By then, or shortly thereafter, DNREC had learned that GACNJ and Hyer had both arranged in 1981, along with Emulsion, to dispose of drummed hazardous substances at the Drum Burial Area.

The first issue is, when did the United States' claim against Emulsion arise? The claim is based upon Emulsion's arrangement to dispose of hazardous substances, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), in 1981 at the Drum Burial Area.[19/] Given the

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[19/] As stated in Paragraph III.A.3 of this Memorandum, above, Emulsion is liable under Section 107(a)(3) of CERCLA, because it contracted with Tony Nero to dispose of drummed waste which Nero took to the Krewatch Site and caused to be buried in the Drum Burial Area.

national policy considerations articulated above, the *Chicago I* test is most applicable to the facts at bar. It is clear, under *Chicago I*, that the United States' Section 107(a)(3), CERCLA "arranger" claims against Emulsion arose in 1996. Until DNREC contacted EPA in 1996 to ask EPA to take over the response action at the Drum Burial Area if Emulsion refused to resume the work, EPA could not "tie" Emulsion "to a known release which [EPA knew would] lead to CERCLA response costs." *Chicago I*, 974 F.2d at 786. Indeed, EPA did not *know* until 1996 that there had been releases at the Drum Burial Area "that would lead to response costs," *Id.*, nor should EPA have reasonably been expected to know that through the exercise of reasonable diligence. *Crystal* Oil, 158 F.3d at 296. EPA had concluded more than eight years before then, based upon an earlier DNREC investigation, that the Drum Burial Area did not merit response action at that time. Given that, EPA's reasonable expectation then was that it would not incur response costs at the Drum Burial Area.

Just as clearly, and for the same reasons, EPA could not have "fairly contemplated" until 1996 the "costs associated with pre-petition conduct resulting in a release or threat of release" that could give rise to a claim against Emulsion. *See In re Jensen*, 995 F.2d at 930; *National Gypsum*, 139 B.R. at 407-08. Thus, under the two leading tests for determining when CERCLA claims arise, for purposes of bankruptcy proceedings, the United States' claim against Emulsion under Section 107(a)(3) arose in 1996, at the earliest.

3. Plaintiff's Claims Against Hyer and Gardner – for Response Costs Incurred Beginning in 1996 Relating to the Drum Burial Area – Likewise Arose in 1996.

The next issue is whether the bankruptcy discharge provided to Gardner and Hyer as a result of confirmation of their Plan on March 11, 1993 protects Gardner and Hyer from liability under CERCLA

that is based upon their 1981 arrangements for disposal of hazardous substances, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).[20/] As stated above, under *Chicago I* EPA could not even "tie" non-debtor *Emulsion* "to a known release which [EPA knew would] lead to CERCLA response costs," *Id.*, at 786, nor should EPA have reasonably been expected to know of Emulsion's connection to the Drum Burial Area through the exercise of reasonable diligence. *Crystal Oil*, 158 F.3d at 296. EPA had concluded slightly more than four years prior to Plan confirmation, based upon the 1988 DNREC investigation, that the Drum Burial Area presented no threat to human health or the environment and did not merit response action at that time. Given that, EPA's reasonable expectation then was that it would not incur response costs at the Drum Burial Area for quite some time, if ever.

On the other hand, had EPA, for whatever reason, wanted to expend investigative resources during the period between December 12, 1988 and March 11, 1993 (the date when Debtors' Plan happened to be confirmed) on a site which did not appear at that time to merit such attention – in order to identify the "asphalt company (from Seaford)" that allegedly had sent drums to the Drum Burial Area in 1981 – EPA would have learned that that company was Emulsion. This would have provided EPA

[20/] The United States contends that Gardner is liable – irrespective of this Court's decision as to whether to reopen this case or any decision on the merits of the issue of the application of the 1993 discharge to the 1981 arrangements for disposal – as an "operator" of the Drum Burial Area in 1996, as a result of its botched, aborted cleanup. See Section 107(a)(2), CERCLA, 42 U.S.C. § 9607(a)(2). Gardner's activities upon which the "operator" claim is based occurred over three years after the discharge of its predecessor's liabilities. Through discovery in this case, and/or the case filed against Debtors in the United States District Court for the District of Delaware, for CERCLA response costs, the United States will seek to determine whether Hyer is liable personally for the 1996 disposals as an alter ego of Gardner.

with no help in linking any bankruptcy notices which Debtors allegedly sent to EPA in 1992 or 1993 with any potential claim EPA might have had against Debtors in 1992 or 1993 relating to the Drum Burial Area. For this reason as well, EPA could not even "tie the bankruptcy debtor to known release of hazardous substances," *Crystal Oil*, 158 F.3d at 296, whether or not the release had been one which EPA knew "would lead to CERCLA response costs." *Chicago I*, 972 F.2d at 786. In sum, there were no claims against *a debtor* that were fairly within EPA's contemplation at the time the Plan was confirmed.

Had EPA learned somehow, prior to confirmation of Debtors' Plan, that Emulsion was the company that had sent drummed waste to the Drum Burial Area in 1993, it is simply unreasonable to suggest that EPA should have investigated further to determine whether there were any other parties who might share liability with Emulsion, should EPA someday be called upon to clean the Drum Burial Area. As Debtors have suggested (*e.g.* during oral argument on December 5, 2001, regarding Plaintiff's Motion to Reopen debtors' bankruptcy cases), it might not have taken EPA much time or energy (assuming EPA had had any reason to pursue it) to identify who the "asphalt company (from Seaford)" was. To have devoted the time of an investigator to determine who else might have been potentially liable regarding a facility that EPA did not anticipate having to clean up, ever – and did not have any reason to believe was related to any debtor – would have been a waste of taxpayers' money and a diversion from Congress's mandate that EPA focus on sites presenting a danger to public health.[21/]

[21/] And, of course, the United States' claim against Gardner as an "operator" of the Drum Burial Area, within the meaning of Section 107(a)(2) of CERCLA, is based on Gardner's post-petition

The *Ben Shemper* case illustrates the relationship required between EPA and a debtor before a claim should be deemed to have arisen. In that case, EPA had dealt with the debtor at two other sites, and had placed the Sapp Site on the NPL. However, EPA did not know of the debtor's connection to the Sapp site until EPA received the debtor's operating records, five years after confirmation of the debtor's bankrptcy plan. The U.S. District Court for the Northern District of Florida held that EPA's claim had not arisen until EPA knew of the debtor's involvement at the Sapp site. The court required more than a "mere regulatory relationship between EPA and [the debtor]" for a contingent claim to exist. *Exhibit 41*, at 19. In the present case, at the time of the GAC and Hyer's plan confirmation, EPA did not know of Defendant-Debtors' connection to the Drum Burial Area. Furthermore, EPA did not know that the Site would require response action under CERCLA. Thus, in the present case, EPA had even less of a relationship to the Debtor-Defendants than EPA did in the *Shemper* case. Accordingly, it is appropriate for the Court to follow *Shemper*, and hold that EPA's claim did not arise until 1996, when EPA knew of the Debtor-Defendants' connection to the Drum Burial Area.

B. Under the Facts at Bar, the United States' Claim Against Hyer is Excepted from Discharge Pursuant to 11 U.S.C. § 523(a)(6).

Under 11 U.S.C. § 523(a)(6), an individual debtor is not discharged from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The Supreme Court has interpreted the provision to include "acts done with the actual intent to cause injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). This formulation "triggers in the lawyer's mind the

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conduct. Under no theory could Debtors reasonably claim that the "operator" claim against Gardner could have been discharged.

category 'intentional torts,' as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend 'the *consequences* of an act,' not simply the act itself." *Id.*, at 62-63 (emphasis in original).

The evidence clearly shows that Hyer intended to injure the property of another. By the summer of 1981, NJDEP had already found several waste handling violations at the Kearny plant. *Exhibits 7, 8.* Hyer had drums shipped to Delaware where he thought he could dispose of them more cheaply and easily. *Exhibit 17,* ¶ *7.* Hyer's bad intentions are evident in the Memorandum by Emulsion's president, Newlin Buckson, to Hyer, dated July 7, 1981, where Buckson stated:

> RE: Kearny Materials Dumped on Seaford
>
> We received three (3) truck loads of foul smelling drummed liquids from Kearny this week - John Cannon says your orders are to bury them on the Seaford Property.
>
> I will do as instructed - however - I think we're making a mistake since it <u>is</u> against E.P.A. rules to do so in unauthorized burial sites. Wouldn't it be wiser to spend a few bucks & send it to a <u>proper</u> landfill?

(*Exhibit 2*) (emphasis in original). A subsequent notation on the Memorandum states, "7/11/81 Per RTH: Bury it!" *Id.*

In this case, the injury intended by Hyer was that drums of foul smelling liquids be buried on someone else's property, when he had been told by Buckson that burial was illegal and knew that the liquids in the drums could contaminate the property. Per a recent search, there are no environmental cases interpreting the *Geiger* standard;[22/] however, the facts at bar meet the definition of intentional

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[22/] The decision in *In re Berry*, 84 B.R. 717, 721 (Bank. W.D. Wash. 1987) precedes *Geiger* by ten years. The court applied the less stringent (since rejected) standard set forth in *In re Cecchini*, 780

injury by the [individual] debtor to the property of another. Hyer, after being advised by Buckson that it violated the law to bury the drums, told him to go ahead and bury them on property that was not Hyer's.

Hyer may contend that the United States is barred from obtaining a ruling that its claim against him is excepted from discharge because of the procedural requirement that complaints objecting to discharge in Chapter 11 bankruptcy cases "shall be filed no later than the first date set for the hearing on confirmation." Fed. R. Bankr. P. 4004(a). The 11th Circuit has ruled, for example, albeit in the context of Chapter 7, that a creditor who received notice of a bankruptcy but was not provided notice of the first meeting of creditors – which triggers a 60-day period for filing objections to discharge in Chapter 7 bankruptcies – had a duty to monitor the progress of the bankruptcy case and could not obtain relief under Section 523 of the Code after that period had run. *Alton v. Byrd*, 837 F.2d 457, 460-61 (11th Cir. 1988). The court stressed that the creditor, having been warned of the bankruptcy proceeding, had only to make a minimal effort to determine the date the petition was filed, the date of the first creditors' meeting, and then calculate the 60 days himself. *Id.* The court distinguished *Byrd* in a later case, ruling that a creditor's claim was not barred, in a Chapter 11 case, notwithstanding that her claim had been scheduled and she had received notice of the bankruptcy, when she had failed to file a

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F.2d 1440, 1443 (9th Cir. 1980). It appears, however, that Berry's conduct, as a debtor-in-possession who abandoned the estate's property without taking "even the most rudimentary procedures" to clean the premises or secure flammable chemicals" and "with full knowledge that the chemical waste presented potentially dangerous environmental and personal safety risks" would constitute intentional harm to the property of another meeting the *Geiger* standard. Further, the facts in the instant case are more egregious than those in *Berry*, in that Hyer did not passively abandon drums on rented property, but actively shipped drums to another's property for illegal disposal.

proof of claim because she had not received notice of the bar date. *In re Spring Valley Farms, Inc.*, 863 F.2d 832, 835 (11th Cir. 1989).

The challenge facing the United States in the instant case is quite different than those facing the creditors in *Byrd* and *Spring Valley*. In both cases the creditors *knew* they had claims but failed to bring them because they had not received notice of specific events in the bankruptcy case. In the instant case, the United States is still investigating whether EPA received notice of Debtor-Defendants' case and, if so, at what juncture of the proceeding. Assuming, *arguendo*, that EPA did receive notice of the bankruptcy in time to have filed claims against the Debtor-Defendants, the fact is that EPA *had no reason to know* that it had any claim to file against Hyer until 1995.

It is clear that the requirements of Fed. R. Bankr. P. 4004(a) are not jurisdictional. The Supreme Court has stated that "[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling." *United States v. Locke*, 471 U.S. 84, 94, n. 10 (1985). As the Second Circuit has concluded, in the context of Fed. R. Bankr. P. 4004(c), "[t]here is nothing in the Bankruptcy Code that persuades us to hold that Rule 4007(c) is any different from a statutory provision that imposes a filing deadline. Nor do we believe that there is a controlling policy goal that would be served by holding that Rule 4007(c) is jurisdictional." *In re Benedict*, 90 F. 3d 50, 54 (2d Cir. 1996).

In the instant case the Court should equitably toll the procedural requirement of Fed. R. Civ. P. 4004(a). Were the Court to find that the United States claim against Hyer arose pre-petition – which the United States believes emphatically not to be the case – the fact remains that it was impossible for EPA to know in 1992-93, when Debtor-Defendants were in bankruptcy, that the United States had a claim on EPA's behalf against Hyer as one who arranged for the disposal of hazardous substances at

the Drum Burial Area. It would be highly inequitable for Hyer to escape liability simply because the United States did not bring its complaint seeking relief from discharge until this proceeding.

C. The Claim Against Emulsion Products Could Not be Discharged because Emulsion Was Not a Debtor in the Reorganization

Emulsion and Debtor-Defendant Gardner state in *Debtor's Response to Motion to Reopen Bankruptcy Cases and for Leave to File Adversary Complaint* that Emulsion "successfully reorganized [its] affairs" through the "consolidated bankruptcy proceedings." *Emulsion/ Gardner Response, at ¶ 7.* The Court should draw no inference from this that Emulsion received any discharge in bankruptcy through the Plan entered in these cases on March 11, 1993. EPA's claim against Emulsion was not discharged, for the following reasons:

(1) 11 U.S.C. § 524(e) states that, except as to community property, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." Accordingly, courts do not have jurisdiction to discharge the liabilities of a non-debtor under a reorganization plan. *Resorts International v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1402 (9th Cir. 1995); *Landsing Diversified Properties – II v. First Nat'l Bank & Trust of Tulsa (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592 (10th Cir. 1990); *In re Davis Broadcasting, Inc.*, 176 B.R. 290, 292 (M.D. Ga. 1994) (District Court cites *R.I.D.C. Indus. Development Fund*, stating that "bankruptcy court can affect only the relationships of debtors and creditors"); *In re Sago Palms Joint Venture*, 39 B.R. 9 (Bankr. S.D.Fla. 1984).

(2) assuming courts do have jurisdiction to discharge liabilities of a non-debtor under a plan, under the plain language of the Plan, Emulsion did not get a discharge;[23/]

(3) assuming courts can grant discharges to non-debtors, and assuming the Plan does say that Emulsion did get a discharge, the United States' failure to object to Emulsion's discharge does not preclude us from litigating whether Emulsion's discharge applies to the United States' claims against it. *In re Continental Airlines, et al.*, 203 F.3d 203, 208-09 (3rd Cir. 2000);

(4) assuming courts can grant discharges to non-debtors, and assuming the Plan does say that Emulsion did get a discharge, the Court cannot discharge the United States' claims against Emulsion because claims against non-debtors can only be discharged where parties who would be enjoined from suing the non-debtors have received consideration under the plan. *Securities and Exchange Commission v. Drexel Burnham Lambert Group, Inc. (In Re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4th Cir. 1989);

[23/] Counsel for the Debtors may suggest that: (1) Emulsion was part of Hyer's bankruptcy estate; (2) "Hyer" is a defined term in the Plan that includes, in certain contexts, the "Bankruptcy Estate" of Hyer; (3) "Hyer" received a discharge under the Plan; (4) therefore, Emulsion received a discharge. For the purposes of this Motion the United States does not believe it is necessary to attach the 156 page Plan. Having reviewed the Plan carefully, the United States comes to the following conclusions. First, it is doubtful that Emulsion's assets were part of Hyer's estate; if anything, since Hyer owned Emulsion's stock, the stock may have been included. Second, we think that the Plan does not include Hyer's estate within the definition of "Hyer." According to the Plan, "Hyer *shall mean* Raymond T. Hyer, Jr., the president and sole shareholder of the Corporate Debtors [which do not include Emulsion] and an individual debtor before the Court. . . . [W]ith respect to the period after the Petition Date, 'Hyer' *shall refer* to the Bankruptcy Estate of Raymond T. Hyer, Jr. ...." (emphasis supplied). Defining a term is readily distinguishable from simply referring to something. Moreover, the 156 page Plan distinguishes on various occasions between Hyer and Emulsion, and never explicitly refers to Emulsion as being part of Hyer's estate, nor does it imply that Emulsion is part of Hyer's estate.

(5) assuming courts can grant discharges to non-debtors, assuming the Plan does say that Emulsion did get a discharge, and assuming courts have the power to discharge the claims of a person or entity without its consent, the Court cannot discharge our claims against Emulsion because EPA had inadequate notice that Emulsion would receive a discharge and discharging Emulsion was not necessary for confirmation of the Plan. *Continental Airlines*, 203 F.3d at 214.

V. CONCLUSION

Plainly the United States' claims against Emulsion, Gardner, and Hyer did not arise until 1996, well after confirmation of the Debtor-Defendants' Plan. Were that not the case as to Hyer, the United States' claim would be excepted from discharge, pursuant to 11 U.S.C. § 523(a)(6), as a result of Hyer's willful and malicious disposal of drums of waste, containing hazardous substances, on the property of another. Emulsion received no discharge or other relief precluding claims against it in Debtor-Defendants' Plan. Were it true that the United States' claim against Emulsion arose prior to confirmation of the Plan, that would be immaterial in any event given the absence of relief to Emulsion under the Plan.

WHEREFORE, the United States respectfully requests judgment in its favor as to issues (1) through (6) set forth in Section 1(B) of this Memorandum, above.

Respectfully submitted,

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